Century Motors. On January 16, 1964, an officer of the Labour Department inspected the wages and Employees Provident Fund records of the company and discovered that the November contribution of Osman had not been paid. The sum due was subsequently paid up on February 3, 1964. A complaint was laid against the appellant "as Manager of Century Motors Ltd." on April 7, 1964, which led to his prosecution and conviction.

The statutory offence under section 16A (1)(c) is one of strict liability and the conviction of Century Motors should have been inevitable upon mere proof of non-payment of any contribution due in respect of any of its employees. The plain duty of the labour officer, of course, was to lay a complaint against the true "employer" and the case could then have been easily disposed of in five minutes or less. Instead of taking this very obvious course, however, the complaint was directed against the company's manager, by invoking the provisions of section 18(2) of the Employees Provident Fund Ordinance, which reads:

"Where an offence under this Ordinance or any regulation or rule thereunder has been committed by a body corporate, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer or a partner of the body corporate, firm, society or other body of persons or was purporting to act in such capacity shall, as well as such body corporate, firm, society or other body of persons, be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances."

The sub-section makes it clear that the manager or other officer in a corporate body is not liable unless it can be said that he was personally at fault by some negligence or omission in the performance of his duties. Proof, however, that he was not to be blamed, lies on him, though the burden is a comparatively light one: see *Carr-Briant* [1] where it was said:

"In our judgment, in any case where, either by statute or at common law, some matter is presumed 'unless the contrary is proved,' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

Here, the uncontradicted evidence of Mr. Dobson, the general manager of Century Motors in Singapore, had absolved the appellant of all responsibility for seeing that contributions were paid into the Employees Provident Fund. The appellant, according to him, was only a supervisor of the Ipoh branch. He was concerned only with sales and was not responsible for the payment of salaries of employees in Century Motors. They were paid by the parent company, Borneo Motors, through the latter's chief clerk or cashier, and all records of Century Motors employees were kept at all times at Borneo Motors. In the circumstances, I do not think the appellant can be said to have failed to have exercised "all diligence" required or expected of him in the performance of his duties. If the specific duty rested entirely on the shoulders of those in Borneo Motors charged with responsibility to pay into the Employees Provident Fund, there could be no failure on the part of the appellant in showing any diligence in the doing of what he was not expected to concern himself.

Justice is achieved in these cases of statutory strict liability by charging the company. To single out, instead, an officer of the company for punishment, unless he was in some way personally culpable, is on affront to the moral conscience.

The appeal is allowed, and the conviction quashed. The fine should be repaid. There is, of course, no reason why the Century Motors should not be proceeded against.

Appeal allowed.

SURIF v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) September 28, 1964]

[K.L. — Federal Court Criminal Appeal No. 45 of 1964]

Criminal Procedure — Evidence — Confession — Taking into consideration evidence of the accused against another — Evidence Ordinance, 1950, s. 30.

Evidence — Confession — Whether admissible against co-accused — Evidence Ordinance, 1950, s. 30.

Two accused persons were charged with robbery and convicted. The question raised in this appeal was whether the confession of the first accused was admissible in evidence and if it was admissible whether it was admissible against the co-accused, the appellant.

Held: (1) as the statement strongly suggested that the first accused had committed the offence of robbery, it was admissible as a confession of robbery;

(2) the learned trial judge was justified in taking into consideration the confession of the first accused against the second accused but it can only be used to support other evidence;

(3) as there was no other evidence to connect the second accused with the robbery, there was no evidence to support the confession.

[**Editorial Note:** In *Amin bin Mohamed* v. *R.* (1956), 2 M.C. 251, C.A. it was held that a statement made to a magistrate, or to anyone else, which amounts to an admission of being present at the scene of the crime and of accompanying the person or persons who committed the crime but which is otherwise exculpatory is entirely inadmissible as against a co-accused but is admissible against the person making it.]

Case referred to:—

(1) *Bhubone Sahu* v. *The King* (1949) L.R. 76 I.A. 147 at p. 156; A.I.R. 1949 P.C. 257.

FEDERAL COURT.

D. A. Devadason for the appellant.

Nik Saghir bin Mohd. Noor (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Barakbah C.J. (Malaya): Saudi bin Sumadi (accused No. 1) and Surif bin Lihan (accused No. 2) were charged as follows:—

"That you on 3rd day of November, 1963 at about 8.00 p.m., at Kang Kwee Hee Estate, 17½ milestone Ayer Hitam in the District of Batu Pahat, in the State of Johore, committed robbery of the property of one Tan Min Lin, and that as such you voluntarily caused hurt to the said Tan Min Lin, and that you thereby committed an offence punishable under s. 394 of the Penal Code."

Alternatively

"That you on 3rd day of November, 1963, at about 8.00 p.m. at Kang Kwee Estate, 17½ milestone Ayer Hitam, in the District of Batu Pahat, in the State of Johore, robbed one Tan Min Lin, and thereby committed an offence punishable under s. 392 of the Penal Code."

They were convicted on the alternative charge of robbery by the learned trial judge and each accused was sentenced to five years imprisonment. Accused No. 2 has now appealed against the conviction and sentence. The evidence was solely circumstantial.

The deceased Tan Min Lin, also known as Ah Pek, was the care-taker of an estate belonging to Kang Kwee Hee (P.W.2) at a salary of $120 per month. On 3rd November 1963, which presumably was the pay-day on the estate, Kang Kwee Hee, the estate owner, paid the deceased a sum of $138.60 at the kongsi house. The deceased handed back $130 which was to be paid to a shop-keeper at Parit Gajah for safe-keeping. Thus the deceased had only $8.60 with him. The next morning, P.W.3, a rubber tapper on the same estate saw two legs inside a drain when he arrived at his tapping task behind the kongsi house. He shouted for his friend named Sailan who was tapping another plot. Both of them went to the kongsi house and called out "Ah Pek" but there was no reply. They then went to the house of Salim. Salim and Sailan then went to the house of P.W.4, the Ketua Kampong, and reported the matter to him. P.W.4 immediately proceeded to Ayer Hitam police station and lodged a report, in consequence of which the police sergeant P.W.15 went to the estate after informing the police inspector P.W.13. The police inspector P.W.13 also proceeded to the kongsi house on the estate where he found the deceased submerged in the water in the drain. He examined the deceased's room in the kongsi house and found that it had been ransacked. Tan Kim Heng P.W.5, identified the body as that of his uncle Tan Min Lin.

The accused No. 1 made a confession to a magistrate implicating the appellant in the robbery which was admitted as evidence by the learned trial judge.

The only evidence against the appellant was the confession and the evidence of P.W.9 Antan bin Rajil.

There were two main grounds of appeal which required the consideration of this court, viz:—

Whether the confession of accused No. 1 was admissible in evidence and if it was admissible, whether it was admissible against the co-accused, the appellant.

As to the first question we are in agreement with the learned trial judge that the confession was admissible evidence on the ground that the charge was that of robbery and not of murder. The statement very strongly suggested that he committed the offence of robbery. With regard to the second question, here again we agree with the opinion expressed by the learned judge that he was justified in taking into consideration the confession of the first accused against the second accused under the provisions of section 30 of the Evidence Ordinance 1950. But is the confession of accused No. 1 alone sufficient to convict the appellant? In the case of *Bhuboni Sahu* v. *The King* (1) Sir John Beaumont, stated:—

".. .. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most of the High Courts in India, namely, that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct. .. .."

As I have mentioned earlier, the only other evidence against the appellant apart from the confession was that of P.W.9. Now let us see what P.W.9 said in his evidence:

"On 3.11.63 at about 6.30 p.m. I went to the big drain by the side of the road in front of my house for my ablutions before the evening prayer. I was bathing my son at the same time. As I was at the Parit with my son I saw Saudi and Surif pass by on bicycles. I saw them entering the estate of P.W.2. I remember giving evidence in the Magistrate's Court about this incident. I said in the Lower Court that they stopped opposite the Kongsi house on the main road. Then they entered the estate and went towards the Kongsi."

According to P.W.10:

"On 3.11.63 at 5 p.m. I went to Parit Raja with Suhud (identified) and Karari (P.W.3). We went to Parit Raja on bicycles. We left Parit Raja for home at 8.30 p.m. On arriving near Parit Salleh I saw three persons seated on the bench of the bus stop at Parit Haji Salleh. I passed these three persons at a distance of about 12 feet. I could recognize only one person and that

person was Saudi, the first accused, whom I have known for eight years. We both live in the same kampong."

The estate was at Parit Haji Salleh. In his confession accused No. 1 stated that he, appellant and one Zakaria went to the deceased's house on 3rd November 1963 at 9.00 p.m. From the evidence disclosed, it would appear that there was nothing to connect the appellant with the robbery, and therefore there was no evidence for the confession to support. In the circumstances we have no alternative but to allow the appeal.

Appeal allowed.

THANGAULU v. SAUDAGAR SINGH

[A.C.J. (Gill J.) October 3, 1964]

[Muar — Civil Appeal No. 5 of 1964]

Moneylenders — Authenticated copy of memorandum not delivered to borrower — Failure to specify rate of interest in memorandum — Moneylenders Ordinance, 1951, s. 16.

Practice and Procedure — Pleadings — Defence of illegality — Point not raised at trial — Whether this ground can be taken on appeal.

In this case the respondent moneylender obtained judgment against the appellant borrower. The appellant had signed a promissory note and had acknowledged receipt of the authenticated copy of the memorandum. At the trial the only point taken was that no authenticated copy of the memorandum was delivered to the borrower at the time of the contract. The learned president of the Sessions Court held, on this point, that as the appellant had acknowledged receipt of the authenticated copy and had not produced the copy delivered to him to show that it was not authenticated, the moneylender had complied with the requirements of the Moneylenders Ordinance and gave judgment in his favour. On appeal the appellant also relied on the further points that (a) in the memorandum the lender's name was shown as that of the borrower and the borrower's name as that of the lender and (b) that the rate of interest was not specified in the memorandum.

Held: (1) the learned president was right in deciding that the moneylender had complied with the provisions of the Moneylenders Ordinance in so far as the supply of the authenticated copy of the memorandum was concerned;

(2) the failure to specify the rate of interest was in breach of the provisions of section 16(3) of the Moneylenders Ordinance and therefore the contract was unenforceable;

(3) as in the pleadings the defence of illegality had been raised the appellant was entitled to take the point on the appeal although he had not raised it at the trial.

Cases referred to:—

(1) *Kartar Singh* v. *Mahinder Singh* [1959] M.L.J. 248.

(2) *Subramaniam* v. *Konar* [1962] M.L.J. 385.

(3) *Natha Singh* v. *Syed Abdul Rahman & Anor.* [1962] M.L.J. 265.

(4) *Lipton* v. *Powell* [1921] 2 K.B. 51 at p. 58.

(5) *North-Western Salt Co.* v. *Electrolytic Alkali Co.* [1914] A.C. 461.

CIVIL APPEAL.

C. M. Perumal Pillai for appellant.

C. P. S. Wong for respondent.

Cur. Adv. Vult.

Gill J.: This is an appeal from a decision of the Sessions Court at Muar, whereby judgment was entered against the appellant, whom I shall call the borrower, in the sum of $1,725 together with interest thereon at the rate of 6% per annum from the date of judgment to the date of realization and costs. The judgment appealed from was given in pursuance of a claim by the respondent, who is a licensed moneylender, founded on a promissory note dated the 18th of October, 1961 executed in his favour by the borrower for a sum of $1,500 bearing interest at 18% per annum.

In his original statement of defence the borrower pleaded that the amount lent to him was $500 and not $1,500 as alleged by the moneylender and that he had repaid $150 in six instalments of $25 each between November 1961 and April 1962, for which the moneylender had refused to issue receipts. In a statement of additional ground of defence the borrower said that in the matter of execution of the promissory note the moneylender had not complied with the provisions of section 16(1) of the Moneylenders Ordinance, 1951. He further alleged that the moneylender fraudulently induced him to enter the figure of $1,500 on the promissory note instead of the figure of $500 by representing to him that the additional sum of $1,000 should be included in the promissory note as security for the repayment of $500 which was the amount actually lent. The borrower then filed an amended statement of defence which, shorn of its verbiage, raised the following defences:

(a) that the execution of the promissory note was a fraudulent transaction so that the contract entered into for the repayment of money was void in law; and

(b) that the contract for the repayment of the money lent on the promissory note and for the payment of any interest on the money lent or for the recovery of any security was not enforceable as the plaintiff had not strictly complied with the provisions of section 16(1) and section 16(3) and section 27 of the Moneylenders Ordinance, 1951.

At the trial of the action the moneylender gave evidence to say that on 18th October, 1961 he lent the borrower a sum of $1,500 and that the borrower executed a promissory note and signed two copies of a memorandum. Both the promissory note and the memorandum were produced and marked as Exhibits P.1 and P.2 respectively. The moneylender went on to say that the borrower himself wrote out the documents and that he gave a copy of the memorandum to the borrower. He denied that the borrower had repaid a sum of $150 as interest, claiming that if interest had been paid he would have issued